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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

GENERAL MOTORS CORPORATION
LARRY KEEFE, DAVID LUCAS
and WILLIAM HARDEN,

Petitioners,

vs.

DAVID LEE MITCHELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a jury should be instructed that punitive damages may not be imposed via respondeat superior under 42 U.S.C. § 1981 where an employer discharges an employee in good faith, without knowledge of another employee's false accusation, an issue which has not been decided previously?

2. Whether a jury should be instructed that liability under 42 U.S.C. § 1981 may not be imposed where an employer discharges an employee in good faith, an issue as to which the Courts of Appeals are divided?

PARTIES

General Motors Corporation, Larry Keefe, (sued erroneously as Larry Keith) David Lucas, William Harden and David Lee Mitchell were all parties to the decision sought to be reviewed here.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

No. ____

GENERAL MOTORS CORPORATION
LARRY KEEFE, DAVID LUCAS
and WILLIAM HARDEN,

Petitioners,

vs.

DAVID LEE MITCHELL,

Respondent.

1. PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners General Motors Corporation ("General Motors"), Larry Keefe, David Lucas and William Harden respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered January 21,

1985, affirming the judgment by the District Court.

2. OPINIONS BELOW.

The opinion of the Court of Appeals is officially reported at 725 F.2d 385 and appears in the appendix hereto at page A-1. The opinion of the United States District Court for the Central District of California is unreported as it was a jury trial.

3. JURISDICTION.

The judgment of the Court of Appeals was entered on January 21, 1985. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

4. STATUTES AND REGULATIONS INVOLVED.

Section 1981 of Title 42 of the United States Code provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

5. STATEMENT OF THE CASE.

In order to minimize the danger of subjective or arbitrary discharge of employees, General Motors formed Human Resources Management Committees ("HRMC") to review and authorize all personnel changes including discharges at its plants. The HRM Committees have authority to discharge employees with less than 10 years service. These Committees alone have authority to discharge such employees. The HRM Committees are composed of high level managers at each plant.

Plaintiff Mitchell in 1977 had less than 10 years service and was a foreman in the trim department at the General Motors Assembly Plant at South Gate, California. Several years

earlier he had served as the plant's Equal Employment Opportunity ("EEO") Coordinator. In this position, Mitchell had several confrontations with another supervisor, Charles Beasley ("Beasley"). In 1977, Beasley was a supervisor in another part of the trim department, at one level above Mitchell's. Mitchell testified that Beasley harassed him. On February 25, 1977, Beasley was acting on the second shift as the shift superintendent (a third level supervisor) in a direct line of supervision over Mitchell. The employees Mitchell supervised finished their work early and asked to leave. Mitchell testified that Beasley told him to let them leave and to sign their time cards for the full

shift. Mitchell did so and then left early himself.

Beasley reported to his superiors that Mitchell had falsified the time cards of the employees. The incident was investigated. Mitchell was free to make a presentation to the Committee and, in fact, chose as his spokesperson, Ollie Hadley, another member of management at the plant. The HRM Committee was made up entirely of managers several levels above Beasley's level. The HRM Committee concluded to discharge Mitchell.

Mitchell brought an action under 42 U.S.C. § 1981 against General Motors and four of its management employees, including Beasley, Larry Keefe (the shift superintendent for the

first shift), David Lucas (the plant personnel director), and William Harden (the plant manager). Lucas and Harden were members of the HRM Committee. The other three members of the HRM Committee were not named as defendants. Mitchell claimed that his discharge was in retaliation for his previous EEO activities.

At trial, defendants sought to include a number of jury instructions. Two of these (Nos. 37B and 44) would have instructed the jury that where an employer discharges an employee in good faith, without knowledge of another employee's false accusation, neither compensatory nor punitive damages may be imposed on the employer. The District Court rejected these instructions.

The jury awarded Mitchell $20,000 in compensatory damages against all defendants, $30,000 in back pay against General Motors and $500,000 in punitive damages against General Motors. Mitchell waived punitive damages against Beasley and the other individual defendants. The judgment was entered on October 29, 1982. Defendants filed a motion for new trial on November 8, 1982. The District Court conditionally granted a new trial unless plaintiff accepted a reduction of punitive damages in excess of $100,000. Plaintiff accepted the reduction. The order was entered on December 9, 1982.

On appeal, the panel affirmed the District Court Order, holding that the jury need not have been instructed

to consider whether the HRM Committee had a good faith, honest belief that Mitchell had committed the acts of which he was accused. The panel also held that the jury need not have been instructed that General Motors could not have authorized or ratified the alleged retaliatory conduct of Beasley unless the HRM Committee knew that the plaintiff was falsely accused.

6. REASON FOR GRANTING THE WRIT.

A. There Is An Important Question Of Federal Law As To Whether Punitive Damages May Be Imposed Via Respondeat Superior Under 42 U.S.C. § 1981 Where An Employer Discharges An Employee In Good Faith, Without Knowledge Of Another Employee's False Accusation.

Defendants' proposed jury instruction No. 37B would have instructed the jury that punitive damages were available against defendant General Motors "only if you find (1) that Beasley and [John] Sullivan [Mitchell's direct supervisor] falsely accused plaintiff of falsifying time cards of hourly employees

and (2) that the Human Resources Management Committee at the plant knew that plaintiff was falsely accused but nevertheless discharged him."

The court below affirmed the trial court's rejection of the instruction on the ground that it failed to instruct the jury that punitive damages may also be imposed, in the absence of proof of fault on the part of the corporation, by respondeat superior. (A-13). The court below then asserts, however, that no federal court has addressed the standard for availability of punitive damages where an employer's liability for compensatory damages is predicated on the doctrine of respondeat superior. (A-15).

Nevertheless, in Foster v. MCI Telecommunications, 555 F.Supp. 330 (D. Colo. 1983) (cited by Petitioners to the court below), where compensatory damages were awarded via respondeat superior, punitive damages were denied under § 1981 because the evidence failed to implicate any official company policy. Id., at 337. In Foster, a branch manager (the discriminatory actor), recommended layoff of a black employee where the vice-president exercised only a cursory, supervisory role in employment decisions. Id., at 333. The manager was "almost solely responsible for deciding which people were to be fired." (Id., at 333). The manager was later fired after an investigation into his racism. (Id., at 333). Although the court did not specify

that its basis for holding MCI liable for compensatory damages was respondeat superior, it could not have been ratification (the manager was discharged for his alleged racism).

Therefore, the only federal authority on this question held that punitive damages would not be available where, as in the instant case, no official General Motors policy was implicated.

Declaring that this was a case of first impression in the federal courts, the court below looked to California law. (A-16). The court below cites Basista v. Weir, 340 F.2d 74 (3d Cir. 1965) for its holding that state common law should apply to the punitive damages

issue. Yet Basista does not stand for this proposition.

In Basista, the Third Cicuit held it improper to look to state law on the issue of punitive damages in a § 1983 action. The court noted that the Civil Rights Acts were intended to have uniform effect throughout the United States. "[T]he amount of damages to be recovered was not to vary because of the law of the state in which the federal court suit was brought." Id. at 86. The court found it particularly improper to look to state law for one component of damages and federal law for another:

> "[W]e cannot conclude that the federal common law may be applied in respect to compensatory or even nominal

> damages while state law . . . would be applicable on the issue of exemplary or punitive damages. To so hold would create a legal hybrid of an incredible and unworkable kind." Id. at 87.

In the case at bar, the court below cites two California cases neither of which are civil rights cases, both of which involve factual contexts entirely unrelated to the instant case, and one of which explicitly limits its holding to cases involving insurance companies. Therefore, the court below should not have looked to California law to find justification for the award of punitive damages. To justify its decision, the court relied upon two state court

interpretations of California Civil Code § 3294(b). The first imposed punitive damages for a bad faith breach of an insurance contract for disability payments by the manager of the company's Los Angeles claims department. Egan v. Mutual of Omaha Insurance Co., 24 Cal.3d 809 (1979).

In Egan, the California Supreme Court made clear the distinction between its holding and a case like the case here presented. First, the Egan court pointed out that the case involved the behavior of the manager of the Los Angeles claims department. He had ultimate supervisory and decisional authority regarding the disposition of all claims. Id., at 823. In the instant case, Beasley had no such

authority. Even under these facts, the Egan court warned, "it must be remembered that we are here concerned with an insurance company dealing in disability insurance, not just any corporation." Id.

Second, insurance company cases are specially treated with regard to punitive damages. The California Supreme Court was careful to limit and qualify its imposition of such damages.

Therefore, Egan is not authority to impose punitive damages via respondeat superior outside the special circumstance of insurance companies and offensive acts by employees with "ultimate supervisory and decisional authority."

The court below also relied on Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757 (1981) to justify its decision under California law. This much-criticized case (See, e.g., Owen, Problems In Assessing Punitive Damages Against Manufacturing Of Defective Products, 49 U.Chi.L.Rev. 1 (1982)) imposed punitive damages for conscious disregard of Pinto design defects. In Grimshaw, the court found that substantial evidence existed that two Ford vice-presidents, the assistant chief engineer of research and the chief chassis engineer all knew of the design defect in the fuel tank system. These were high level decision makers. Grimshaw, supra, at 814.

Mitchell involved a single incident of racially offensive behavior by an acting third (normally a second) level supervisor. In Grimshaw, high level officers knew and apparently ratified the act. In that case, the product review meetings involved explicit approval by the highest level policy makers at Ford, with knowledge of the defect. Id. at 776-777. The Grimshaw court stated:

> "Ford's management decided to proceed with the production of the Pinto with knowledge of the tests results revealing design defects which rendered the fuel tank extremely vulnerable on rear impacts at low

> speeds. . . . Such constitutes corporate malice." Id. at 814 (emphasis added).

This sounds like ratification, not respondeat superior. In fact, the Grimshaw court declined to decide or declare whether this is a case decided under respondeat superior (Restatement 2d, Torts Subdivision (c) or ratification doctrine, subdivision (d)). Id. at 813. Therefore, it is questionable at best to cite Grimshaw as authority for respondeat superior theory when the court indicates that its basis may instead be ratification (which appears most likely under the facts).

Finally, Grimshaw quotes Egan for the proposition that,

> "Defendant should not be allowed to insulate itself

> from liability by giving an employee a non-managerial title and relegating to him crucial policy decisions." Id. at 814; Egan, supra at 823.

Here, General Motors has done precisely the opposite. It has explicitly placed the authority to discharge at the high level of the HRM Committee.

Nevertheless, the court below, based on Egan and Grimshaw, concluded as follows:

> "Thus, if the jury found Beasley to be a managerial employee, the jury could have imposed punitive damages on General Motors, even if General Motors did not know

the reprehensible nature of Beasley's acts." (A-19). (Emphasis added.)

By so holding, the court below has gone far beyond the other circuits and gone well beyond both the Ninth Circuit's case law (which the court concedes) and the California case law, which it purports to apply.

Such an extention of punitive damages under § 1981 is unprecedented and clearly unwarranted. Mitchell asserted that his discharge was accomplished by General Motors through Beasley with malice and retaliatory intent. Yet the decision to discharge was made by the Human Resources Management Committee (a separate reviewing body) with independent and exclusive

authority to discharge employees. Every member of this Committee was in a managerial position several levels above that of Beasley. This Committee had the task of determining whether Mitchell should be discharged for his alleged falsification of time cards. If this Committee behaved in good faith, without knowledge of any false accusation, even if it came to an incorrect conclusion, it did not behave maliciously or with intent to harm Mitchell. The Committee is a safeguard to prevent, or at least deter, arbitrary or unreasonable discharge of employees. It is designed to prevent a lower level supervisor from having undue influence over such decisions.

The standard of imposing punitive damages via respondeat superior under § 1981 is a broad and unwarranted extension of federal law. It is not surprising to find the Ninth Circuit alone among the circuits in this position. Considering the enormous potential liability involved and the importance of these issues in the scheme of civil rights litigation, there exists a very obvious need for this Court to establish a uniform rule removing the confusion and disarray presently existing. This case is an excellent vehicle to resolve these important issues.

B. This Court Should Resolve The Conflict In The Courts Of Appeals As To Whether A Jury Should Be Instructed That Liability Under 42 U.S.C. § 1981 Cannot Be Imposed Where An Employer Discharges An Employee In Good Faith.

This case brings to this Court the perfect opportunity to resolve a conflict among the circuits and to establish uniformity as to whether liability under § 1981 may be imposed upon an employer who in good faith, without knowledge of the falsity of an accusation, discharges an employee based on such accusations. The court below held that an employer may be liable for the good faith discharge of an employee

without knowledge of the offensive acts committed by a fellow employee. This standard is broader than that of any other Circuit Court of Appeals and clearly contravenes the standard adopted by the Eleventh and Fifth Circuits.

Other circuits have interpreted § 1981 so that if an employer wrongly, but honestly, believes that an employee committed a dischargeable offense, and the employer acts on that belief, it is not guilty of racial discrimination. Turner v. Texas Instruments, 555 F.2d 1251, 1256 (5th Cir. 1977); see also, Moore v. Sears Roebuck & Co., 683 F.2d 1321, 1323, n. 4 (11th Cir. 1982). Therefore, compensatory damages cannot be imposed under § 1981 via a respondeat superior theory against a company acting

in good faith, without knowledge of the falsity of the accusation.

Defendants' proposed jury instruction No. 44 applied this law to the facts of the instant case:

> "If you find that the Human Resources Management Committee at the South Gate Plan had an honest belief, even if mistaken, that plaintiff signed the time cards of his hourly employees for a full shift but had sent them home early without authorization and acted on that belief in discharging plaintiff, then you must find for defendants." (CR 68, p. 6).

Moreover, prior to the decision below, the Ninth Circuit had not held an employer liable under § 1981 via a respondeat superior theory without regard to an employer's good faith. In Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979), cited by the panel, a summary judgment for the bank was reversed by holding that the mere existence of an employer's policy against sexual harassment will not prevent respondeat superior liability where a female employee's supervisor had her fired for failure to acquiesce to his sexual demands. The court did not decide the issue of what effect the employer's good faith might have on the case if brought to trial. Yet this is the issue presented in the instant case. Moreover, the Miller case,

unlike Mitchell's, did not involve jury instructions (it was an appeal from a summary judgment) or the basis for awarding punitive damages.

In Jones v. Los Angeles Community College District, 702 F.2d 203, 205 (9th Cir. 1983), the Ninth Circuit decided in a Title VII case, that when those in authority in good faith believe the truth of charges presented against an employee, and then discharge the employee, the employer is not liable. This holding is even stronger when applied to a § 1981 case, where intentional discrimination must be found to establish liability. Gay v. Waiters Dairy Lunchmen's Union, 694 F.2d 534, 536 (9th Cir. 1982).

Nevertheless, the court below stepped beyond these authorities and rejected defendants' proposed jury instruction No. 44, and by so doing, held that General Motors could be liable under § 1981 where the HRM Committee, in good faith and without knowledge of Beasley's offensive acts, discharged Mitchell. The proposed instruction referred to the Human Resources Management Committee because it was the entity which had the authority to discharge Mitchell and did exercise that authority. Since the act complained of by Mitchell was General Motors' discharge of him, the instruction properly directed the jury's attention to the Committee which discharged him. Section 1981 only protects against decisions motivated by

unlawful and intentional racial discrimination. It does not protect against business decisions that simply may be erroneous.

7. CONCLUSION.

For these reasons, a Writ of Certiorari should be issued to review the opinion and judgment of the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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APPENDIX

FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID LEE MITCHELL,	)	Nos. 83-5526
	)	83-5856
Plaintiff-Appellee,	)	
	)	D.C. No.
vs.	)	CV 80-0299-AWT
	)	
LARRY KEITH, DAVID LUCAS, CHARLES BEASLEY, WILLIAM HARDEN, and GENERAL MOTORS CORPORATION,	)	OPINION
	)	
Defendants-Appellants.	)	

Appeal from the United States
District Court for the
Central District of
California
A. Wallace Tashima, District Judge,
Presiding
Argued and submitted March 5, 1984

Before: FARRIS, and ALARCON, Circuit Judges, and PRICE*, District Judge.

ALARCON, Circuit Judge:
This case presents issues of an employer's liability under 42 U.S.C. § 1981 for the discriminatory animus of a management-level employee.

I

David Lee Mitchell (Mitchell), a Negro, began working for General Motors Corporation in 1968 at its South Gate, California, plant. From December, 1971 to 1973, Mitchell worked in the personnel department as the plant's first Equal Employment Opportunity (EEO) Coordinator. As EEO Coordinator,

---

* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

Mitchell made substantial changes at the plant in favor of minority employees, including upgrading their pay schedules. There was testimony that these activities caused resentment on the part of some Caucasian employees. In particular, Mitchell was involved in confrontations with Charles Beasley (Beasley), a supervisor, whose derogatory racial comments about certain minority employees were reported by Mitchell to Mr. Pig, the Personnel Director.

In 1974, Mitchell was transferred to the trim department as a supervisor. Mitchell first worked under a general supervisor named Gary Anderson and later under John Sullivan. Beasley was a general supervisor in another part of the trim department.

Mitchell testified that he was constantly harrassed by Beasley, who monitored his comings and goings, did not pass on telephone messages, and made derogatory racial comments about Mitchell, other minority employees, and Mitchell's wife.

On February 25, 1977, most of the South Gate plant was on temporary layoff, while the plant was being readied for a model change. Beasley was acting as the shift superintendent; he was thus on that day in a direct line of supervision over Mitchell (Beasley to Sullivan to Mitchell). Mitchell was supervising three hourly employees, who had been called in to work. These employees quickly finished their work. Under the terms of their collective bargaining agreement, they would have

received 95 percent of their pay had they stayed home on layoff. They asked to be allowed to leave early. Mitchell testified that Beasley told him to let his three employees leave and to sign their time cards for the full shift. Mitchell did this and then left early himself.

Beasley reported to his superiors that Mitchell had falsified the time cards of these employees by giving them credit for a full shift. An investigation followed, during which Beasley recommended Mitchell's discharge. The Human Resources Management Committee decided to discharge Mitchell.

Mitchell brought an action under 42 U.S.C. § 1981 against General Motors and four of its management-

level employees, including Beasley, claiming that he was discharged in retaliation for his EEO activities on behalf of minority employees. The jury returned a verdict awarding Mitchell $20,000 in compensatory damages against all defendants, $30,000 in back pay against General Motors, and $500,000 in punitive damages against General Motors (Mitchell had waived punitives against the individuals). The judgment was entered on October 29, 1982. On December 9, 1982, the court filed an order denying the defendants' motion for a new trial, on the condition that Mitchell file a remittitur of the punitive damages by December 20. Mitchell filed his acceptance of remittitur on December 10. Thus, by Mitchell's timely filing of

remittitur, the motion for new trial was denied. Subsequently, the court awarded Mitchell's counsel $25,000 in attorney's fees. General Motors and the four individual defendants appeal the judgment and the award of attorney's fees.

II

We note at the outset of our analysis that appellants do not contend that the evidence was insufficient as a matter of law to support judgment in favor of Mitchell. Instead, appellants contend that the trial court's refusal to give certain proposed instructions compels reversal. At oral argument, during a discussion of punitive damages, appellants' counsel was asked whether he "concede[d] that the verdict as to

the compensatory damages was correct." Counsel stated: "No, Your Honor, I don't believe so in view of the fact we didn't get some jury instructions I think we should have gotten. Not that there isn't some evidence to support the compensatory damages - that's another question - but we're talking about jury instructions we didn't receive."

We have concluded that the district judge correctly refused these instructions, because they did not fully set forth the law and were therefore inaccurate. There is no error in a refusal to give incorrect or misleading instructions. See Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371, 376 (9th Cir. 1966); see also Guerini Stone Co. v.

A-8.

P. J. Carlin Construction Co., 240 U.S. 264, 283 (1916); Cherry v. Stedman, 259 F.2d 774, 777-78 (8th Cir. 1958).

A

Appellants contend that the trial court erred in refusing to give the following instruction (Defendants' Proposed Jury Instruction No. 44):

> If you find that the Human Resources Management Committee at the South Gate plant had an honest belief, even if mistaken, that plaintiff signed the time cards of his hourly employees for a full shift but had sent them home early without authorization, and acted

on that belief in discharging plantiff, then you must find for the defendants.

This instruction as submitted was misleading and inaccurate in that it failed to instruct the jury that an employer may be liable for a violation of § 1981 under the doctrine of respondeat superior. It is the law of this circuit that an employer who acted in good faith in firing an employee may be liable "where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions ...." Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979) (Employer-bank may be held liable under Title VII and § 1981 for employee-

supervisor's discrimination). Here, the actions complained of were those of Beasley, who, according to testimony presented at trial, took advantage of a temporary position as Mitchell's direct supervisor in order to have Mitchell discharged. Beasley himself could not discharge Mitchell, but he could and did recommend Mitchell's discharge to the Human Resources Management Committee, which had the authorization to discipline and discharge employees. Thus, General Motors, through its committee, could be liable for Beasley's wrongful actions by (1) ratification, (2) authorization, or (3) respondeat superior. As the proposed instruction failed to inform the jury concerning respondeat superior, it was incorrect and should not have been given.

The trial judge correctly refused the proposed instruction.

B

Appellant General Motors contends that the trial court erred in refusing to give the following instruction (Defendant's Proposed Jury Instruction No. 37B):

> In this case plaintiff claims he should recover punitive damages against defendant General Motors, as well as against the individual defendants. Punitive damages, however, may be awarded against General Motors only if you find (1) that Beasley and Sullivan falsely accused

plaintiff of falsifying time cards of hourly employees and (2) that the Human Resources Management Committee at the plant knew that plaintiff was falsely accused but nevertheless discharged him.

To the extent that this proposed instruction informed the jury that punitive damages could be imposed on General Motors for the ratification or authorization of Beasley's acts, these theories of liability were covered by another instruction, also offered by the defendants, which the judge did give. 1/ There is no error in refusing to use any particular language offered by a party, and there is no obligation to give

repetitious instructions. Temblador v. Hamburg-American Lines, 368 F.2d 365, 367 (9th Cir. 1966). The judge did not err in refusing to give this instruction to the jury because other instructions which were given covered the same matter.

Furthermore, the defendant's proposed instruction is misleading because it omits relevant principles of the law applicable to this case. In addition to liability arising from ratification and authorization, punitive damages also may be imposed, in the absence of proof of fault on the part of the corporation, where the wrongful actor is a managerial employee.

This court recognized the availability of punitive damages under

§ 1981 in Williams v. Owens-Illinois, Inc., 665 F.2d 918, 928 (9th Cir.), cert. denied, 103 S. Ct. 302 (1982). See also Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975); Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 883 (8th Cir.), cert. denied, 434 U.S. 891 (1977). A number of courts have awarded punitive damages in section 1981 vicarious liability cases. See, e.g., EEOC v. Gaddis, 733 F.2d 1373, 1380 (10th Cir. 1984) (en banc), citing Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979) (An employee is liable under both Title VII and section 1981 where the racially discriminatory act complained of "was that of a supervisor, authorized to hire, fire, discipline, or promote, or at least

to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy."); Jones v. Local 520, 524 F.Supp. 487, 494 (S.D. Ill. 1981). See also Padway v. Palches, 665 F.2d 965, 967 (9th Cir. 1982) (holding that the school district would be liable, or the theory of respondeat superior, for the actions of an employee who is authorized to recommend hiring or firing). Nevertheless, no federal court has specifically or extensively addressed the standard for the availability of punitive damages where an employer's liability for compensatory damages is predicated on the doctrine of respondeat superior.

The issue of what damages may be awarded in a section 1981 action must

generally be determined from federal law rather than specific state statute. See, e.g., T & S Service Association, Inc. v. Crenson, 666 F.2d 722 (1st Cir. 1981). Where federal laws "are deficient in the provisions necessary to furnish suitable remedies, courts must look to the law of the state wherein sits the court having jurisdiction of the matter." 42 U.S.C. § 1988; Basista v. Weir, 340 F.2d 74, 85-87 (3rd Cir. 1965). 2/ In this case, we must look to the law of California.

Under California law, an employer may be made to pay punitive damages based upon the acts of an employee, where the employer (1) authorized the acts, (2) ratified the acts, (3) knowingly or recklessly employed an unfit

employee, or (4) employed the person, who did the wrongful acts in the scope of employment, in a managerial capacity. Cal. Civ. Code § 3294(b) (West Supp. 1984); Egan v. Mutual of Omaha Insurance Co., 24 Cal. 3d 809, 822 (1979) (bad faith breach of insurance contract), appeal dismissed, 445 U.S. 912 (1980); Grimshaw v. Ford Motor Co., 119 Cal.App. 3d 757, 813 (1981) (conscious disregard of Pinto design defect). In the first three situations, punitive damages are imposed on the employer because of the employer's own reprehensible conduct. In the fourth situation, punitive damages are imposed on the employer because of managerial employee's reprehensible conduct. Imposing punitive damages on the employer serves to deter the employment

of unfit persons for important positions. Restatement (Second) of Torts § 909 comment b (1977).

Thus, punitive damages might have been imposed on General Motors not only if the corporation ratified or authorized Beasley's acts, but also if Beasley acted in a managerial capacity. Whether an employee acts in a managerial capacity depends upon (the degree of discretion the employee[] possess[es] in making decisions that will ultimately determine corporate policy." Egan, 24 Cal. 3d at 822-23. The court gave an instruction on "managerial capacity," offered by the defendants, which adequately stated this rule: "an agent or employee acts in a managerial capacity whenever a degree of discretion permitted

the agent or employee in making decisions is such that the agent or employee's decisions will ultimately determine the corporation's business policy." Thus, if the jury found Beasley to be a managerial employee, 3/ the jury could have imposed punitive damages on General Motors, even if General Motors did not know the reprehensible nature of Beasley's acts. As the defendant's offered instruction did not include this alternative basis for liability, it was inaccurate. The trial judge correctly refused the instruction.

C

The appellants contend that the trial court erred in refusing to give their proposed instruction 27A or 27B,

each of which stated in pertinent part that Mitchell needed to show that he would not have been discharged "but for" his assistance to other employees in opposing a racially discriminatory practice. Instead, the court instructed the jury that Mitchell's opposition to a racially discriminatory practice must have been "a substantial and determinative cause for his discharge."

In the age discrimination context, in which the plaintiff must show that age was a determining factor in the employee's discharge, we have stated that either the "determining factor" or the "but for" language is appropriate. The plaintiff is not required to show that age was the sole factor. Kelly v. American Standard, Inc., 640 F.2d 974,

984 (9th Cir. 1981).

Similarly, in the racial discrimination context, the plaintiff does not have to show that discrimination was the sole cause for discharge. It is sufficient to show that the discrimination made a difference between retention and discharge. Either the "determining factor" or the "but for" language is sufficient to convey this burden.

Here, the judge's use of "determinative cause for his discharge" was adequate to convey Mitchell's burden of proof. As the instruction given by the judge adequately stated the law, there is no error in refusing to use the particular language requested by a party. See Temblador, 368 F.2d at 367; Fleming v. Michigan Mutual Liability Co., 363

F.2d 186, 189 (8th Cir. 1966). The use of the word "substantial" was unnecessary, but the defendants cannot show that they were prejudiced by its use.

We note also that defendants' proposed instruction 27A and 27B were incorrect, because they excluded the possibility of respondeat superior liability, as discussed in part A above. The judge did not err in refusing these instructions.

D

The appellants contend that the trial court erred in refusing to give an instruction that discriminatory comments alone are not sufficient to support a verdict for Mitchell. The defendants' proposed jury instruction

no. 45 stated:

> An employer is not an absolute guarantor of a perfect work environment free from all frictions, even including those with racial overtones. Thus, sporadic disagreements, altercations, conflicts and irritations caused by co-workers, even if they concern racial matters, and even if believed, cannot, standing alone, be enough to find for plaintiff.

In another instruction given by the judge, the jury was properly informed concerning the plaintiff's burden of proof. As the plaintiff's burden of proof was adequately covered, the judge did not abuse his

discretion in deciding that this instruction was unnecessary and argumentative in nature. Temblador, 368 F.2d at 367; Fleming, 363 F.2d at 189.

E

The appellants offered an instruction (Defendants' Proposed Jury Instruction No. 30) which stated: "Under the law, defendants could discharge plaintiff from his employment at any time if, in their opinion, he was not a suitable employee. The mere fact of discharge does not establish plaintiff's claim, even though you may feel that the discharge was unwarranted or unreasonable." The trial court deleted the final phrase, "even though you may feel the discharge was unwarranted or unreason-

able." The appellants contend that this was error.

A trial court is not required to use the precise language offered by a party. The judge did not abuse his discretion in deciding that the deleted language was argumentative in nature and unnecessary to convey the import of the instruction. Temblador, 368 F.2d at 367; Fleming, 363 F.2d at 189.

III

The trial court refused to allow evidence of Mitchell's failure to file a discrimination charge with either federal or state fair employment agencies. Decisions of the trial court on the admissibility of evidence are reviewed for abuse of discretion. M/V American

Queen v. San Diego Marine Construction Corp., 708 f.2d 1483, 1491 (9th Cir. 1983). Rule 403 of the Federal Rules of Evidence states the test for the exclusion of evidence:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentations of cumulative evidence.

The appellants claim that they should have been allowed to introduce this evidence in order to attack Mitchell's

credibility. They say it is not credible that one who had served as EEO Coordinator would not file a discrimination claim. We assume that this testimony would be probative of Mitchell's credibility. On the other hand, there is no requirement that a plaintiff file a discrimination claim in order to bring suit under § 1981. Morrision v. Jones, 607 F.2d 1969, 1275 (9th Cir. 1979), cert. denied, 445 U.S. 962 (1980). This evidence might well have confused the issues, misled the jury, and wasted time by forcing the plaintiff to put in evidence showing why he decided to pursue one remedy rather than another. We cannot say that the trial judge abused his discretion in refusing to admit this testimony.

IV

The appellants contend that the court should not have granted the motion for attorney's fees. We review an award of attorney's fees for abuse of discretion. Metcalf v. Borba, 681 F.2d 1183, 1188 (9th Cir. 1982).

Mitchell's original complaint stated that he would seek attorney's fees should he prevail. After entering judgment on the jury verdict in favor of Mitchell, the trial court granted General Motor's motion for new trial, unless Mitchell would accept a remittitur. Mitchell accepted the remittitur on December 10, 1982, but he also asked the court to reconsider the remittitur order. The court denied Mitchell's motion on January 10, 1983. During the

period between January 10 and March 2, the attorneys negotiated the fee issue out of court. Mitchell filed for fees on March 2, 1983.

The appellants contend that Mitchell unreasonably delayed filing the motion for attorney's fees. Concerns of delay center upon "the need to prevent fragmented appellate review and unfair postjudgment surprise to non-prevailing defendants." White v. New Hampshire Department of Employment Security, 455 U.S. 445, 452 (1982). The purpose of these concerns is to promote finality, judicial economy, and fairness. See id. The appellants argue that the delay in filing for fees created a "serious danger" of fragmented review. In fact, the parties were able to brief and argue

the merits of the judgment and the award of attorney's fees together. We have not had to review this matter piecemeal. The interest of judicial economy have been served. The appellants do not contend that they were unfairly surprised or prejudiced by the delay, and the record shows no indication of surprise or prejudice. The district court did not abuse its discretion in awarding attorney's fees to Mitchell.

V

As there was no error in the refusal of the proposed jury instructions and no abuse of discretion in the refusal of evidence and the award of attorney's fees. we AFFIRM.

FOOTNOTES

1/ The judge instructed the jury as follows:

> In this case plaintiff claims that he should recover punitive damages against defendant General Motors. Punitive damages, however, may be awarded against General Motors for the acts of its agents or employees only if General Motors authorized or ratified the conduct which is found to be the basis for punitive damages with knowledge of its malicious, oppressive or willful nature. In addition, any such ratification or authorization by the corporation must have been by an agent or employee acting in a

managerial capacity. Ratification means approval of an act after it is done.

2/ 42 U.S.C. § 1988 provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions . . . of Title "CIVIL RIGHTS" [§§ 1977-91] . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object,

> or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

3/ There may be some question whether the evidence is sufficient to support the finding that Beasley acted in a managerial capacity. The defendants did not

appeal on the ground of sufficiency of the evidence. As there was no briefing on this issue, we decline to raise it sua sponte. Sample v. Schweiker, 694 F.2d 639, 640 n.1 (9th Cir. 1982); Nuelsen v. Sorensen, 293 F.2d 454, 462 (9th Cir. 1961).

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No. 84-1647

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

GENERAL MOTORS CORPORATION, LARRY KEEFE, DAVID LUCAS and WILLIAM HARDEN

Petitioners,

vs.

DAVID LEE MITCHELL

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

This Petition for Writ of Certiorari concerns only two proposed jury instructions.

1.) Respondent objects to Petitioners Statement of the Questions Presented for Review. Petitioners inaccurately use the word "employer" and "employee" when neither word appears in the jury instruction objected to. Rather, the Petitioners asked the jury to find that both an in-house review committee and the offending managers were guilty of intentionally tortious conduct.

The proposed instruction, number 37B, stated:

> In this case plaintiff claims he should recover punitive damages against defendant General Motors, as well as against the individual defendants. Punitive damages, however, may be awarded against General Motors only if you find (1) that Beasley and Sullivan falsely accused plaintiff of falsifying time cards of houly employees and (2) that the Human Resources Management Committee at the plant knew that plaintiff was falsely accused but nevertheless discharged him.

2.) There is no conflict in the Courts of Appeal on corporate liability under 42 U.S.C. § 1981. The cases cited are inapposite. None involved proof of intentional misconduct. Here Respondent proved intentional misconduct by Petitioners. No appellate review has ever been sought on this factual issue.

The proposed instruction, number 44, stated:

> If you find that the Human Resources Management Committee at the South Gate plant had an honest belief, even if mistaken, that plaintiff

signed the time cards of his hourly employees for a full shift but had sent them home early without authorization, and acted on that belief in discharging plaintiff, then you must find for the defendants.

PARTIES TO THE PROCEEDING

Petitioner's statement of the parties to the proceeding before the Ninth Circuit is incomplete. In addition to plaintiff, DAVID LEE MITCHELL, and defendants GENERAL MOTORS CORPORATION, LARRY KEEFE, (sued erroneously as LARRY KEITH), DAVID LUCAS, and WILLIAM HARDEN, one CHARLES BEASLEY was also a party to that proceeding.

Mr. BEASLEY is not a party to the Petition for Writ of Certiorari. No request for leave to amend the petition has been made. Accordingly, the judgment against him has become final. *Bird v. United States* 241 F.2d 516, 519 (1st Cir. 1957); *D.C. Federation of Civic Associations v. Volpe* 459 F.2d 1231, 1267 (D.C.C.A. 1971).

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BRIEF FOR RESPONDENT IN OPPOSITION

1.

OPINIONS BELOW.

The official citation for the unanimous opinion of the Court of Appeals in this matter is 752 F.2d 385, not 725 F.2d 385 as stated by petitioners.

2.

STATUTES AND REGULATIONS INVOLVED.

Petitioners include 42 U.S.C. § 1981 as a statute involved in this case, however, petitioners fail to cite and include 42 U.S.C. § 1988, a material and important statute cited by the Ninth Circuit Court of Appeals which states, in pertinent part:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions . . . of Title 'CIVIL RIGHTS' [§§ 1977-91] . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

3.

STATEMENT OF THE CASE.

Respondent adopts the Ninth Circuit's recitation of the facts in this case. (See Petitioners' Brief at pp. A-1-A-6) Petitioners' Statement of the Case is misleading and omits important matters.

First, the nature and extent of MITCHELL's Equal Employment Opportunity Coordinator activities and the nature and extent of his run-ins with BEASLEY, while EEO Coordinator, and later in the factory are down-played. Certain important details of the events on February 25, 1977, the date in question, are omitted, i.e., that the amount of GENERAL MOTORS money over which MITCHELL was fired involved five percent of a partial day's pay for three hourly employees.

Petitioners assert that the present case involved "a single incident of racially offensive behavior." (Petitioners' Brief at p. 19)

This is quite incorrect, as indicated by the Ninth Circuit opinion. It is there shown that over a period of years Mitchell was confronted by supervisor Beasley "whose derogatory racial comments about certain minority employees were reported by Mitchell to Mr. Pig, the Personnel Director." (Petitioners' Brief at p. A-2)

Further, the court of appeals opinion shows that after 1974 there was testimony that respondent Mitchell:

> "....was constantly harassed by Beasley, who monitored his comings and goings, did not pass on telephone messages, and made derogatory racial comments about Mitchell, other minority employ-

ees, and Mitchell's wife." (Petitioners' Brief at p. A-3)

Finally, petitioners inaccurately state the holding of the Ninth Circuit. (See Petitioners' Brief at Pages 8-9) With regard to proposed jury instruction number 44, the Ninth Circuit held:

> "This instruction as submitted was misleading and inaccurate in that it failed to instruct the jury that an employer may be liable for a violation of § 1981 under the doctrine of *respondent superior*."

(See Page A-9 of Petitioners' Brief).

As to petitioners' proposed jury instruction number 37B, the Ninth Circuit held:

> To the extent that this proposed instruction informed the jury that punitive damages could be imposed on General Motors for the ratification or authorization of Beasley's acts, these theories of liability were covered by another instruction, also offered by the defendants, which the judge did give. There is no error in refusing to use any particular language offered by a party, and there is no obligation to give a repetitious instruction. [Citation] . . . "Furthermore, the defendant's proposed instruction is misleading because it omits relevant principles of the law applicable to this case. In addition to liability arising from ratification and authorization, punitive damages also may be imposed, in the absence of proof of fault on the part of the corporation, where the wrongful actor is a managerial employee."

(See Petitioners' Brief at Pages A-12, A-13.)

4.

SUMMARY OF ARGUMENT.

A. Punitive damages were properly imposed on GENERAL MOTORS, for plaintiff's retaliatory discharge under 42 U.S.C. § 1981, based on the actions of a managerial employee under the doctrine of respondeat superior without ratification of the conduct by an in-house review committee. *EEOC v. Gaddis* 733 F.2d 1373, 1380 (10th Cir. 1984) (en banc); *Miller v. Bank of America* 600 F.2d 211, 213 (9th Cir. 1979); Restatement (Second) of Torts, § 909.

GENERAL MOTORS is responsible where the actions complained of were those of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions. *Miller v. Bank of America* 600 F.2d 211, 213 (9th Cir. 1979). *Flowers v. Crouch-Walker Corporation* 552 F.2d 1277, 1282 (7th Cir. 1977)

B. There is no conflict in the Courts of Appeal on the question of good faith discharge. Each case cited by petitioners is inapposite because the plaintiff failed to prove any intentional discrimination or pretextual discharge by the corporation or any of its employees. In this case, respondent proved intentional discrimination and pretextual discharge by petitioners.

5.

REASONS FOR REJECTING THE WRIT.

A. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW ON THE ISSUE OF IMPOSITION OF PUNITIVE DAMAGES, AGAINST A CORPORATE EMPLOYER, UNDER *RESPONDEAT SUPERIOR*, IN AN ACTION FOR RETALIATORY DISCHARGE UNDER 42 U.S.C. § 1981. THE CASES CITED BY PETITIONERS DO NOT SUPPORT THIS CONTENTION AND THE JURY INSTRUCTION OFFERED BY PETITIONERS ON THIS ISSUE WAS ARGUMENTATIVE, MISLEADING, AND AN INCORRECT STATEMENT OF THE LAW.

Petitioners have what amounts to a hidden agendum. It would permit large companies such as GENERAL MOTORS to hide from and avoid responsibility for intentional tortious acts of executives and managerial employees, for whose acts they would ordinarily be responsible, by setting up buffer committees to review this conduct.

Acts of intentional bigotry at companies like GENERAL MOTORS are not done abstractly or in a vacuum by the 'corporation." They are committed by its personnel at its offices and factories supervising others. Here BEASLEY was the acting shift superintendent two levels above foreman MITCHELL when MITCHELL was set up by him and fired.

Petitioners are in reality attempting to obtain appellate review of a factual finding that BEASLEY acted in a managerial capacity and bound GENERAL MOTORS. Petitioners' argument centers upon the alleged impartial nature of the HRM Committee, the high level status of its members, as compared to the much lower level of BEASLEY, and the alleged lack of knowledge by the HRM Committee as to the false accusations made against MITCHELL. Without these assumptions, the argument has no force or effect. (See Pages 22-23 of Petitioners' Brief)

No appellate review has ever been sought regarding sufficiency of the evidence to support the finding that BEASLEY acted in a managerial capacity. The Ninth Circuit specifically raised this issue and indicated it would not undertake a *sua sponte* review of that question. (See Pages A-18, A-19, A-33 and A-34 of Petitioners' Brief) At trial petitioners' counsel never once asserted, intimated, or argued that BEASLEY's actions were other than in a "managerial capacity" and on appeal, Appellants Opening Brief, at Page 35 and Appellants Reply Brief, at Page 10 specifically concede BEASLEY acted in a "managerial capacity." This Court cannot now permit petitioners to raise a factual issue for which appellate review has never been sought and which has been conceded numerous times throughout this litigation.

Finally, petitioners' argument hinges upon its assertion that no knowledge, authorization or ratification of BEASLEY's actions was established against the HRM Committee. (See Petitioners' Brief Pages 4, 6, 7, 22 and 23) Again, because petitioners never sought appellate review re: sufficiency of the evidence to establish knowledge, authorization and/or ratification against the HRM

Committee, they cannot be permitted to do so in this indirect and roundabout fashion.

Petitioners' legal arguments are also misleading. Clearly, the federal common law on damages, in an action under 42 U.S.C. § 1981, must apply. 42 U.S.C. § 1988; *Basista v. Weir* 340 F.2d 74, 85-87 (3rd Cir. 1965).

On the more narrow issue of application of *respondeat superior* in an action under 42 U.S.C. § 1981, numerous federal cases discuss and apply this doctrine

In *EEOC v. Gaddis* 733 F.2d 1373, 1380 (10th Cir. 1984) (en banc) punitive damages under 42 U.S.C. § 1981 were specifically awarded against an employer for actions of a management level employee. That court stated:

> "An employer is liable under both Title VII and section 1981, 'where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy.' [Citations]"

The case of *Miller v. Bank of America* 600 F.2d 211, 213-214 (9th Cir. 1979) cited with approval in *Gaddis, supra,* at p. 1380, specifically applied the doctrine of *respondeat superior* to a corporate employer, for actions of a supervisor who either had authority to hire, fire, discipline and promote *or* had authority to participate in or recommend such actions.

In *Flowers v. Crouch-Walker Corporation* 552 F.2d 1277, 1282 (7th Cir. 1977), plaintiff, a bricklayer, brought an action under Title VII and 42 U.S.C. § 1981 against his corporate employer alleging discharge on account of race. In connection with the doctrine of *respondeat superior*, that court stated:

> "Plaintiff was discharged shortly after having been assigned to a new supervisor, Paul Kolkau, on whom the primary weight of suspicion falls in plaintiff's case. The defendant is liable as principal for any violation of Title VII or section 1981 by Kolkau in his authorized capacity as supervisor. [Citations]"

Flowers, supra, at p. 1282.

In the case of *Lucero v. Beth Israel Hospital and Geriatric Center* 479 F.Supp.452, 455-456 (D.Colo. 1979) punitive damages were imposed against a corporate employer, in an action under 42 U.S.C. § 1981, based upon the doctrine of *respondeat superior.* In *Lucero* the plaintiffs were employed as respiratory therapists by defendant, a non-profit corporation operating a hospital. Plaintiffs' immediate supervisor, one Williams, was employed by the corporate hospital as the director of the respiratory therapy department. Above Williams, one Dr. Beckwitt, was the medical director of the respiratory therapy department of the corporate defendant. The *Lucero* plaintiffs claimed a course of continued harassment by Williams and the court so found. In addition, the court concluded the acts of Williams were sufficient to bind the corporation for punitive damages, despite plaintiffs' failure to prove that Dr. Beckwitt or any other high level corporate employee had knowledge of the alleged discrimination claims.

Based upon each of these decisions, respondent believes the federal law on imposition of punitive damages in a retaliatory discharge case under 42 U.S.C. § 1981 is well established and supports the Ninth Circuit's opinion in this regard.

Assuming *arguendo* the federal law on this particular issue is insufficient, the Ninth Circuit was required, by

statute and by case law, to look at and apply California law on this question.

Title 42 U.S.C. § 1988 requires that federal law be used in an action under 42 U.S.C. § 1981. However, that statute goes on to state, in pertinent part:

> " . . . but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

(42 U.S.C. § 1988)

Apparently the Ninth Circuit felt no federal court had:

> " . . . specifically or extensively addressed the standard for the availability of punitive damages where an employer's liability for compensatory damages is predicated on the doctrine of *respondeat superior*:"

and based upon 42 U.S.C. § 1988 and *Basista v. Weir* 340 F.2d 74, 85-87 (3d Cir. 1965) concluded that examination of California law on this issue would be helpful. (See Pages A-15, A-16 of Petitioners' Brief)

The Ninth Circuit's reliance on 42 U.S.C. § 1988 and *Basista* was correct. Petitioners' quotation from *Basista* is misleading, and that case is inapposite here. The issue raised in *Basista* dealt with a small punitive damage award when no compensatory damages were awarded. On that

particular issue, the law in Pennsylvania, the state where the case was heard, differed from the federal law. Accordingly, the *Basista* court held that application of Pennsylvania law would be inappropriate because ample federal authority on that issue existed. *Basista, supra,* p. 87.

Here, the issue re: punitive damages is different from the issue in *Basista* and petitioners' citation of that case as allegedly demonstrating the Ninth Circuit's incorrect application of state law is simply not true.

In this case, the Ninth Circuit correctly interpreted California law on the issue of corporate responsibility for punitive damages. California Civil Code Section 3294(b) specifically states punitive damages may be imposed upon a corporate employer if the particular act, fraud, malice or oppression was done by an officer, director, or managing agent of the corporation.

In *Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 822, cited by the Ninth Circuit, the law on corporate responsibility for punitive damages was stated to be that found in the Restatement (Second) of Torts, § 909:

> "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act. (Rest. 2d Torts, § 909)"

In *Grimshaw v. Ford Motor Company* (1981) 119 Cal.App.3d 757, 813, also cited by the Ninth Circuit,

California's application of the Restatement (Second) of Torts, § 909, was reaffirmed.

Petitioners' attempts to distinguish *Egan* and *Grimshaw*, on their specific facts, are unpersuasive and not compelling. Both cases were cited to demonstrate California's adherence to the Restatement of Torts § 909. Under that rule, a variety of factual scenarios are sufficient to impose liability for punitive damages upon GENERAL MOTORS. Because no factual issues have ever been raised in the appellate process by petitioners, their claims of factual distinctions between the instant case and that rule of law must be rejected.

Finally, petitioners' proposed jury instruction 37-B, on this issue, was properly rejected. The instruction itself contained statements of law on the doctrines of ratification and authorization which were covered in another instruction offered by petitioners and given by the District Court. (See Petitioners' Brief at Pages A-31 and A-32) No obligation to give repetitive instructions or to use particular language offered by a party is imposed on the Court. *Temblador v. Hamburg-American Lines* 368 F.2d 365, 367 (9th Circ. 1966).

In addition, the proposed instruction was misleading because it failed to contain any statement of law whatsoever on imposition of punitive damages, in the absence of proof of fault, where the wrongful actor is a managerial employee of the corporation. (See Page A-13 of petitioner's brief).

Thus, the District Court properly instructed the jury on this particular issue. The omitted instruction was legally insufficient and the Ninth Circuit properly affirmed the District Court's refusal to give it.

B. THERE IS NO CONFLICT IN THE COURTS OF APPEAL ON THE QUESTION OF GOOD FAITH DISCHARGE OF AN EMPLOYEE IN A RETALIATORY DISCHARGE ACTION UNDER 42 U.S.C. SECTION 1981. THE CASES CITED BY PETITIONERS ARE INAPPLICABLE BECAUSE NONE CONTAINED PROOF OF INTENTIONAL DISCRIMINATION OR PRETEXTUAL DISCHARGE BY THE CORPORATION OR ANY OF ITS EMPLOYEES.

The case below was an action of retaliatory discharge under 42 U.S.C. § 1981. Respondent proved that a managerial employee had intentionally discriminated against him and caused his discharge in retaliation for his civil rights activities. Clearly, intentional and/or deliberate discrimination by the defendant must be proven. *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 802-806, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

All of the cases cited by Petitioners are sharply distinguishable from the present case, wherein intentional discrimination was shown. In *all* cases cited by Petitioners there was no evidence whatsoever in the trial court that Plaintiff sustained the burden of proof of intentional discrimination by the corporate employer, through any employees action.

In *Moore v. Sears, Roebuck and Company*, 683 F.2d 1321, 1322-1323, (11th Cir. 1982) the issue was whether the trial judge properly admitted certain memoranda proving that plaintiff had been discharged for reasons other than age, i.e. inability to perform his work. The defendant, Sears, claimed

its reasons for termination were not pretextual and that plaintiff had failed to sustain his burden of proof that there was intentional discrimination against him by anyone at Sears.

Thus, the *Moore* decision stands for the proposition that intentional discrimination must be proven before recovery under 42 U.S.C. § 1981 can be obtained. Respondent agrees with this statement of the law. Here, Mitchell proved the discrimination by Petitioners, against him, was intentional and deliberate. No such proof was available in the *Moore* case and it has no application here.

In *Turner v. Texas Instruments, Incorporated*, 555 F.2d 1251, 1257 (5th Cir. 1977), a black employee claimed he had been discriminated against and terminated for reasons other than the time card violations which were the ostensible cause of his firing. In support of his claim, the employee introduced statistical evidence re: termination of black employees in comparison with the percentage of black employees in the corporation. The court found this statistical evidence did not support a finding of intentional discrimination, because no proof of pretext had been made:

> "With the exception of this evidenee, Turner produced nothing suggesting that TI's reasons for his dismissal and the retention of Burns were pretextural. Turner failed to carry his burden of proof that TI's reasons for dismissal were pretextural."

Turner, supra, at p. 1257.

Thus, *Turner* holds that absent proof of intentional and deliberate discrimination by a managerial level employee the corporate defendant cannot have violated 42 U.S.C. § 1981. It does not require that a jury instruction on 'good-faith discharge" be given. The facts in this case amply

demonstrated intentional and deliberate discrimination against Mitchell by Petitioners. The issue of "good faith discharge" and lack of knowledge was negated by the jury's finding of pretext. Accordingly, *Turner* is miscited and inapplicable here.

In *Jones v. Los Angeles Community College District*, 702 F.2d 203, 205-206 (9th Cir. 1983) plaintiff, a female police officer at a college, claimed she had been discharged because of her sex and replaced by a male. The college proved, at various hearings, that Jones was dishonest in the use of sick leave, discourteous in the treatment of fellow employees, inattentive, derelict in her duties and subordinate. Jones failed to prove the pretextual nature of her firing and did not establish intentional discrimination. The *Jones* holding is mis-cited and has nothing whatsoever to do with the facts of this case. *Jones* involved a Title VII claim and a failure to prove pretext and intentional discrimination. Here, Mitchell proved intentional discrimination by a managerial employee, Beasley, and that his firing was pretextual and based on Respondent's previous civil rights activities.

In *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 536, 548 (9th Cir. 1982) the same problem arose. Statistics by black waiters, offered to prove a discrimination charge failed to establish even a prima facie case. The *Gay* court, discussed and upheld the District Court's finding on this issue:

> "Concluding that proof of intentional discrimination is required for section 1981 claims . . . the district court held that the class had failed to prove a prima facie case of an alleged pattern or practice of purposeful discrimination against black male waiter applicants. The district judge

> concluded that the circumstantial evidence was wanting and that the statistical presentation was insufficient to raise a prima facie case . . . and entered judgment for the hotels on the class claim." *Gay, supra*, at pp. 536, 548.

Clearly, in *Gay* there was totally insufficient evidence to prove intentional discrimination. That case differs markedly from the facts here. Respondent does not contend that discrimination can be accidental, negligent or even reckless. It obviously must be deliberate and intentional. Respondent does not claim he was accidentally, negligently, or recklessly set-up, retaliated against and discharged. The actions against him were intentional and deliberate. The District Court properly instructed the jury on this issue, the Ninth Circuit upheld this instruction and Petitioners' claims of error are incorrect.

None of the cases deal with a situation where a manager or other supervisory level employee of a corporation has intentionally discriminated against the discharged employee. Thus, none of the cases cited by petitioners involved a finding that the discrimination and/or firing was "pretextual."

The "good faith belief" and lack of knowledge by some in-house committee who reviewed the discharge is a red herring issue. No case relieves a corporation from liability for acts of the managerial level employee if some in-house body has been established and performs an in-house review of the firing.

To adopt this standard would permit every corporation to avoid all liability under 42 U.S.C. § 1981 by establishing a committee to review all firings. That committee would rubber stamp each discharge, disclaim knowledge of a set-up or retaliation, and, assuming it was properly insulated

from the facts of the case, no discharged plaintiff could ever prove discrimination against a corporate employer. That is not the law and no case cited by Petitioners remotely resembles or deals with that situation. Furthermore, to adopt Petitioners' contentions would eviscerate all 42 U.S.C. § 1981 claims and effectively prevent a discharged employee from ever recovering damages, either compensatory or punitive, against a corporate employer who utilizes this in-house review procedure.

CONCLUSION

For all the reasons set forth above, respondent urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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